Jaburg & Wilk, P.C.
ATTORNEYS AT LAW

3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012

David S. Gingras

dsg@jaburgwilk.com
Direct Line 602/248-1000
Main Fax 602/248-0522

March 12, 2007

VIA FACSIMILE: (615) 320-3737
& U.S. Mail

John R. Jacobson, Esq.
BOWEN RILEY WARNOCK & JACOBSON, PLC
1906 West End Avenue
Nashville, TN 37203

Re: *Energy Automation Systems, Inc. v. Xcentric Ventures, L.L.C., et al.*

Dear Mr. Jacobson:

This firm is litigation counsel to Xcentric Ventures, L.L.C. ("Xcentric") and Ed Magedson ("Mr. Magedson"). As you also know, Xcentric has previously expressed concerns regarding the original complaint you filed in the above-styled action on behalf of your client Energy Automation Systems, Inc. ("EASI").

As explained before, because of the immunity extended to websites by the Communications Decency Act, 47 U.S.C. § 230, Xcentric cannot, as a matter of law, be held liable for material which was authored by a third party. As you know, Xcentric has received emails from the President of EASI, Mr. Merlo, admitting his awareness of the true identity of the individual who wrote the allegedly defamatory material about EASI posted on the Rip-Off Report. For that reason, Xcentric believed that EASI's initial complaint violated Fed. R. Civ. P. 11.

Recently, I understand that due to either our prior concerns or due to the court's order requiring EASI to file a RICO case statement explaining its claims, EASI has filed an Amended Complaint dated March 5, 2007. I have reviewed this new complaint thoroughly.

The dismissal of the RICO claims by EASI was certainly appropriate. While these claims should never have been pleaded at all, and while Xcentric does not intend to waive any rights or claims it has against EASI or others for commencing those claims, those issues aside, Xcentric nevertheless appreciates EASI's efforts to narrow the case and remove claims which are presented only for their PR value.

EXHIBIT
tabbies
C

However, after scrutinizing the Amended Complaint, it appears that EASI is seeking to advance two theories/strategies, both of which are still flawed. Theory #1 is generally this—Xcentric actively "solicits" complaints, and this solicitation, standing alone, makes Xcentric strictly liable for the veracity of every word published on the Rip-Off Report site.

It is true that, in theory, pursuant to Section 876 of the Restatement (Second) of Torts, Tennessee law permits joint liability upon A for the acts of B when A and B are shown to be actively involved in a conspiracy. However, "to impose liability for such a claim, 'the jury must find that the defendant knew that his companions' conduct constituted a breach of duty, and that he gave substantial assistance or encouragement to them in their acts.'" *Downen v. Testa*, 2003 WL 2002411, *4 (Tenn.Ct.App. 2003) (quoting *Cecil v. Hardin,* 575 S.W.2d 268 (Tenn. 1978)).

It is creative to extend this argument to suggest that Xcentric should be jointly liable with unnamed co-conspirators for what these others have written, but I believe this theory will fail on the merits for multiple reasons. First, although Xcentric may "encourage" people to visit the Rip-Off Report and post complaints, there is not a scintilla of evidence to show that Xcentric has encouraged anyone to file *false* complaints. On the contrary, each person who attempts to submit a report is required to check a box certifying that their post is truthful. As such, there is no factual basis to support a finding that Xcentric knew of or encouraged the posting of the allegedly defamatory statements at issue here. Second, this theory is plainly preempted by the CDA to the extent that EASI is trying to end-run around the clear intent and purpose of the law by making a website liable for third-party statements under a co-conspirator theory. *See* 47 U.S.C. § 230(c)(1); "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

Theory #2 is actually more of a strategy. It is most apparent in ¶ 17 of the Amended Complaint where EASI alleges, first, that Xcentric has "developed and/or created" certain "original content" on the site. Second, EASI lists some of the numerous "Report titles, headings, and/or editorial messages" which it claims are defamatory. After reviewing these allegations several times, something subtle but important appears—EASI claims that Xcentric creates some content for the site, and EASI claims that the site has some defamatory content, but EASI never alleges that Xcentric actually created any of the *actual defamatory content* at issue in this case. As such, I do not believe the Amended Complaint can survive a Rule 12(b)(6) Motion to Dismiss for failure to state a claim.

The fact that EASI (in ¶ 18 of the Amended Complaint) accuses Xcentric of "exert[ing] significant editorial control over the content of the Website[]" does not affect this analysis because the CDA "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content.'" *Green v. America Online,* 318 F.3d 465, 470 (3rd Cir. 2003).

Given these issues, I believe EASI's Amended Complaint still violates Rule 11 insofar as it seeks to present claims which are directly contrary to federal law and insofar as it seeks to impose liability upon Xcentric for "publishing" statements which EASI knows were authored by a third party (as Mr. Merlo expressly admitted). In addition to moving to dismiss on the basis of personal jurisdiction, Xcentric also intends to seek dismissal under Rule 12(b)(6) and/or summary judgment under Rule 56. If necessary, Xcentric also intends to file the enclosed Motion for Sanctions under Rule 11.

In case you were not aware, Xcentric has been sued perhaps two dozen times in recent years based on theories identical to those asserted by EASI in this case. Without exaggeration, Xcentric has never lost such a case, and over the years, Xcentric has developed a detailed litigation strategy of its own for resolving such matters swiftly and decisively.

Of course, Xcentric understands that your client may feel that it is totally unfair for information to appear on the Rip-Off Report which the original author now admits was false. Xcentric is not without sympathy for this situation, but as a matter of policy, Xcentric will never remove reports even if the original author later recants. The reason for this is simple—if reports were removed at an author's request, this would give companies a strong incentive to pressure/coerce/threaten consumers into withdrawing even valid complaints using fear of costly litigation. Xcentric believes its policy removes this incentive, and this makes the site a more reliable tool overall, even if it means that one or more inaccurate complaints remain posted.

Having said this, because this litigation is frivolous as explained above, Xcentric demands that EASI dismiss this matter with prejudice no later than Friday, April 6, 2007. If this matter is not dismissed on or before that date, Xcentric will file the enclosed motion at the conclusion of the case and will also pursue any/all other remedies it may have against EASI and anyone involved in the wrongful commencement and/or continuation of this case.

If you have any additional questions, please feel free to contact either Maria Crimi Speth or David S. Gingras at (602) 248-1000 at your convenience or via email at: MCS@JABURGWILK.COM or David Gingras at DSG@JABURGWILK.COM.

Very truly yours,

JABURG & WILK, P.C.

David S. Gingras

Enclosures: 1.) Rule 11 Motion for Sanctions

cc: Xcentric Ventures, L.L.C.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

ENERGY AUTOMATION SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	Case No. 3:06-1079
	)	
v.	)	Judge Trauger
	)	
XCENTRIC VENTURES, LLC, *ET AL.*,	)	Magistrate Judge Griffin
	)	
Defendants.	)	

MOTION FOR RULE 11 SANCTIONS

Pursuant to Fed. R. Civ. P. 11(c), Defendants XCENTRIC VENTURES, L.L.C. ("Xcentric") and ED MAGEDSON ("Magedson"; collectively "Defendants") hereby move this Honorable Court for an order granting sanctions, jointly and severally, against Plaintiff ENERGY AUTOMATION SYSTEMS, INC. ("EASI") and Plaintiff's attorneys JOHN R. JACOBSON, WILLIAM L. CAMPBELL, JR., W. RUSSELL TABER and BOWEN RILEY WARNOCK & JACOBSON, PLC (collectively "Plaintiff's counsel"). For the reasons explained herein, EASI and Plaintiff's counsel should be sanctioned in the amount of Defendants' reasonable costs and attorneys' fees incurred in the defense of this action because: 1.) the allegations in this matter lacked any evidentiary support whatsoever at the time this action was commenced; 2.) the legal contentions asserted by Plaintiff's counsel are both frivolous in their entirety and expressly contrary to established law; and 3.) this entire action was commenced solely for improper purposes including the suppression of lawful speech.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Defendant Xcentric Ventures, LLC operates a website located at www.RipoffReport.com and www.BadBusinessBureau.com (the "ROR Site") which operates as a form of public message board, allowing third parties to post and view comments and complaints about businesses who they feel have wronged them. According to ¶ 6 of Plaintiff's Complaint ("Compl."), EASI is a Tennessee-based business engaged in the distribution of equipment which reduces electricity consumption.

According to ¶ 11 of the Complaint, EASI alleged that Defendants had "developed, created, written and published on the Websites in the form of report titles, various headings and editorial messages numerous false and deceptively misleading statements of fact concerning EASI, its dealerships, and its employees." ¶ 11 of the Complaint continues on to describe certain allegedly "false and deceptively misleading" statements which EASI alleged were personally "authored and published" by Defendants.

As explained below, these allegations violate Rule 11 because they are patently false and neither EASI nor its counsel had any factual basis to support them at the time they were made. On the contrary, EASI and its counsel intentionally framed these false allegations in this manner in an attempt to avoid the application of a federal statute (the Communications Decency Act; 47 U.S.C. § 230) which expressly immunizes interactive websites from publisher- or distributor-based liability for statements authored by third parties.

As such, Plaintiff's Complaint violates all three subsections of Fed. R. Civ. P. 11(b) because: 1.) the Complaint was filed solely for the purpose of harassment; 2.) the claims set forth therein were directly contrary to existing law; and 3.) the factual contentions had no evidentiary support of any kind, and both Plaintiff and Plaintiff's counsel knew that no basis existed to believe that these allegations were likely to find evidentiary support after further investigation. Sanctions are therefore mandated.

II. COMMUNICATIONS DECENCY ACT—SHORT HISTORY

It is well-established that under certain circumstances, those who "publish" or "distribute" defamatory statements via traditional methods (i.e., a newspaper or magazine) can be liable for false statements authored by a third party:

> At common law, "primary publishers," such as book, newspaper, or magazine publishers, are liable for defamation on the same basis as authors. Book sellers, news vendors, or other "distributors," however, may only be held liable if they knew or had reason to know of a publication's defamatory content.

Barrett v. Rosenthal, --- Cal.Rptr.3d ----, 2006 WL 3346218, *4 (Cal. Nov. 20, 2006) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); Prosser & Keeton, The Law of Torts (5th ed.1984) § 113, pp. 810-811; Rest.2d Torts, § 581, subd. (1), & coms. c, d, & e, pp. 232-234; *Osmond v. EWAP, Inc.* 153 Cal.App.3d 842, 852-854 (1984)).

For many years, this rule made sense because the publisher of traditional media sources can always review content before publication—in other words, virtually every word in a newspaper has been or could be reviewed by the publisher before printing. For that reason, courts allowed defamation plaintiffs to sue a publisher even if the content at issue was written by a third party.

The Internet has presented a new paradigm wherein people can publish statements by the millions on public message boards virtually instantly, at any time of the day or night, without any opportunity for review by the site operator. Allowing traditional publisher- or distributor-based liability against website operators in this context would thus provide an immense incentive for such websites to prohibit any publication of messages by third parties, thereby reducing the amount of free speech available online.

For that reason, in 1996 Congress enacted the Communications Decency Act, 47 U.S.C. § 230, which prohibits all civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties. This federal statute, which was passed by Congress with the intent to "promote unfettered speech," provides in relevant part that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Green v. America Online,* 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA, "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content.'").

An outstanding explanation of this law and its history is set forth in the California Supreme Court's recent opinion in *Barrett v. Rosenthal*, --- Cal.Rptr.3d ----, 2006 WL 3346218 (Cal. Nov. 20, 2006), cited above. In fact, as the *Barrett* Court recognized, the CDA has been universally interpreted as providing immunity to interactive websites for content created by a third party. *See Barrett*, 2006 WL 3346218, *18 note 18; (citing *Blumenthal v. Drudge*, 992 F.Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930, 933-934 (N.D.Ind. 2001); *PatentWizard, Inc. v. Kinko's, Inc.* 163 F.Supp.2d 1069, 1071 (D.S.D. 2001); *Green v. America Online*, 318 F.3d 465, 470-471 (3rd Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-1124 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-1004 (Conn.Super.Ct. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-1017 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-42 (Wn.App. 2001); *Barrett v. Fonorow* 799 N.E.2d 916, 923-925 (Ill.App.Ct. 2003); *Donato v. Moldow* 865 A.2d 711, 720-727 (N.J.

Super.Ct.App.Div. 2005); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 392-394 (Ariz.App. 2005)).

Secondary authority has also explained that:

> [The CDA's] provisions set up a complete shield from a defamation suit for an online service provider, absent an affirmative showing that the service was the actual author of the defamatory content. Accordingly, a number of courts have ruled that the ISP was immune from liability for defamation where allegedly libelous statements were made available by third parties through an ISP or were posted by third parties on the server's billboards, as the ISP fell within the scope of 47 U.S.C.A. § 230.

Jay M. Zitter, J.D., Annotation—*Liability of Internet Service Provider for Internet or E-mail Defamation* § 2, 84 A.L.R.5th 169 (2000) (emphasis added) (citing Pantazis, Note, *Zeran v America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531 (1999)); *see also Batzel v. Smith,* 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

The underlined text set forth in the block quote above is the specific reason why serious sanctions should be ordered here. As explained above, the CDA provides immunity to a website *provided* the website did not actually author the defamatory comment. Here, Defendants did not author any of the defamatory content concerning EASI, and thus are entitled to full and complete CDA immunity.

With this in mind, and without a scintilla of evidence to support it, Plaintiff and Plaintiff's counsel falsely alleged that Defendants did author the content at issue. This baseless allegation was made for a single purpose—to enable the Complaint to survive a Rule 12(b)(6) Motion to Dismiss (because the allegations, though false, must be taken as true in such a motion). Indeed, not only did Plaintiff and its counsel have no evidence to support the position at the time it was made, prior to the filing of this motion Defendants notified Plaintiff in writing that they were not the authors of any of the content at issue in the case and demanded that the Complaint be dismissed. Despite this demand, and despite knowing that the case was entirely without basis in fact or law, Plaintiff refused to dismiss the action thus requiring this motion.

By filing this action, Plaintiff and counsel have abused this Court's process and wasted the valuable and limited resources of the judiciary for an improper purpose. All of the authority cited above does nothing to affect the personal liability of those who actually author false and defamatory statements. By the same token, there is not now, and never has been, any factual or legal basis for Plaintiff to impose liability against Defendants in light of the immunity to which they are entitled under the CDA.

Because Plaintiff and Plaintiff's counsel have knowingly and repeatedly violated Fed. R. Civ. P. 11(b)(3), this Court should sanction them in the amount of all of Defendants' reasonable attorneys' fees incurred in defending this frivolous action.

III. THE ALLEGATIONS THAT DEFENDANTS ARE THE AUTHORS OF THE POSTINGS LACK EVIDENTIARY SUPPORT AND ARE FALSE

There are over reports on Rip-off Report and most of those reports have two or more "rebuttals" which are essentially sub-reports. There are literally millions of entries on Rip-off Report. (See home page attached as Exhibit "A"). The sheer volume of content alone makes it highly unlikely that one person or even one company is the author of any particular posting on Rip-off Report. However, not only did Plaintiff and its counsel have no reason to believe that Xcentric authored any information about EASI, prior to the commencement of this initiation Plaintiff admitted that it knew the identity of the person responsible for writing the defamatory statements at issue in this case. Specifically, on May 22, 2006, the CEO of EASI, Mr. Joseph C. Merlo sent the following email to the editor of Rip-Off Report (next page):

From: EASIJoe@aol.com [mailto:EASIJoe@aol.com]
Sent: Monday, May 22, 2006 10:48 AM

To: EDitor@ripoffreport.com
Subject: Attn: ED Magedson

Ed:

I need your help.

Your web site, Ripoffreport.com, contains numerous negative postings on me, my company, its employees and business associates, etc. going back to April, 2003. There are also some positive rebuttals posted by Dealers and employees defending the company. For the most part, the negative postings are lies and slander.

Energy Automation Systems (also known as EASI) has many successful Dealers, but we have been in litigation with a handful of disgruntled Dealers. So far, we have had three trials during which these disgruntled Dealers made similar allegations. These Dealers were represented by very competent counsel. We have won each trial. Obviously, three juries have not agreed.

During pre-trial discovery we learned that virtually all the negative postings on Ripoffreport were made by ONE man. He used numerous false names and locations, many times responding to his own postings under different names. He even used names and locations of actual Dealers and employees. Meanwhile, all the positive rebuttals were posted by real Dealers and employees using their real names and locations. He has admitted to this in a sworn, videotaped, deposition.

These libelous and slanderous postings have cost my company a literal fortune in lost business, which we can document.

I know you don't normally remove postings, nor do you check the veracity of the claims being made, or confirm the identity of the person making the postings. However, considering that we have this man's sworn testimony, ON VIDEOTAPE, would you make an exception and delete the entire thread on my company? It doesn't get any clearer than this. It would be the right thing to do. I will be pleased to have our lawyers provide you with a copy of the transcript of that portion of his testimony, or even a copy of the video.

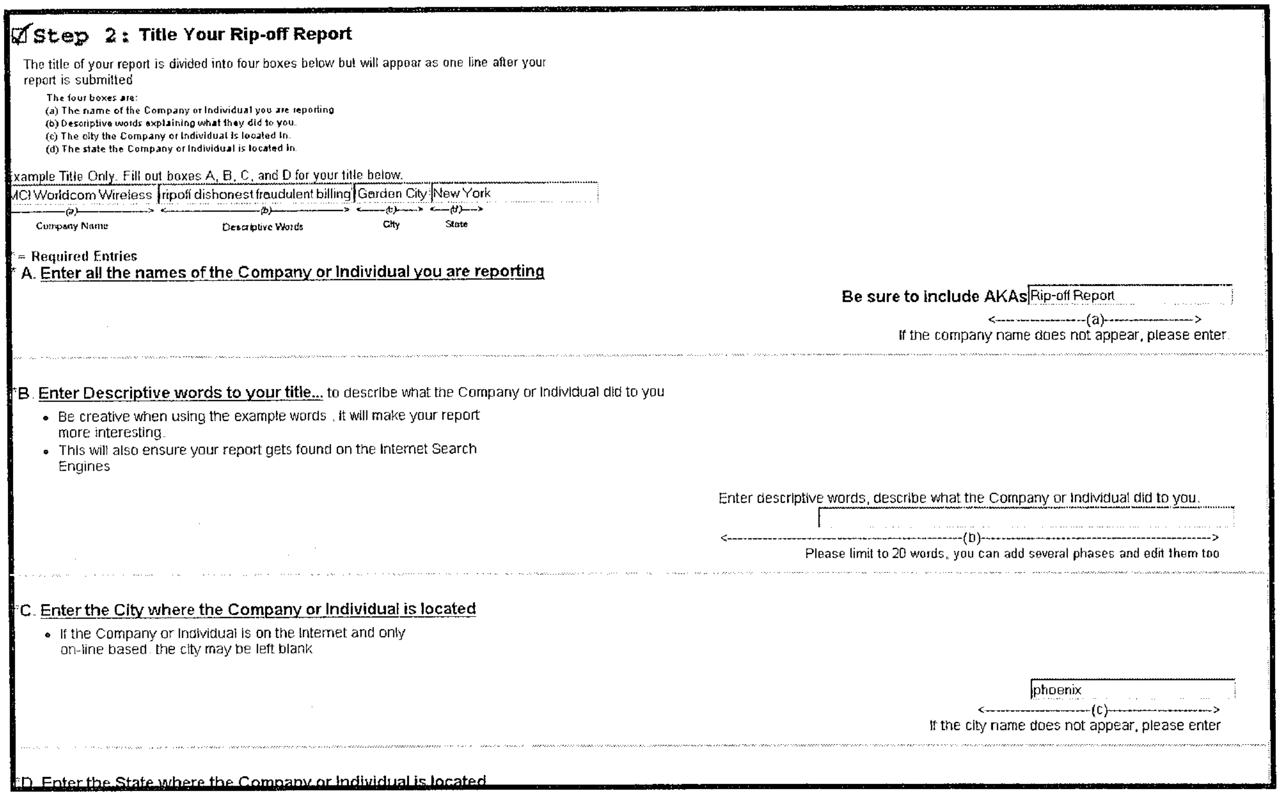
Best regards,
Joseph C. Merlo
Chief Executive Officer

See **Exhibit A** (emphasis added)

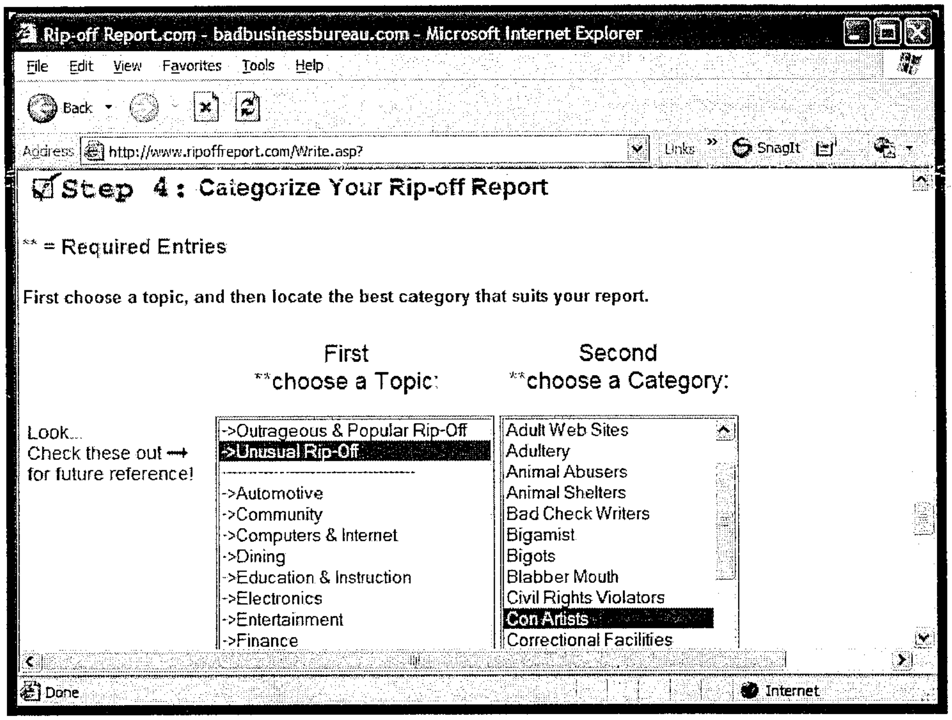
The import of this email is undeniable. It demonstrates that Mr. Merlo, EASI, and EASI's counsel knew the identity of the author of the information which EASI later falsely claimed was written by Defendants. This admission establishes that by filing this action, Plaintiff and its counsel have abused this Court's process and wasted the valuable and limited resources of the judiciary by commencing an action which they knew to be factually groundless.

In its Amended Complaint, Plaintiff backs away from accusing Xcentric of drafting the false statements mentioned by Mr. Merlo in his email. However, the Amended Complaint continued attempting to circumvent both the law and these admitted facts by claiming that Defendants authored "report titles, various headings and editorial messages" about EASI. There was and is, however, no support for that contention. Attached are all of the postings about EASI on Rip-off Report. **Exhibit B.** There is one entry from the editor of Rip-off Report, "we know that this response did not come from the original author." **Exhibit B,** posting dated May 24, 2003. That is a true statement of fact, that is not derogatory, that was authored more than three years ago (thus, any claim as to that statement would be barred by the statute of limitations).

As to report titles or headings, these are authored by the person posting the report and submitted along with the report. Not only does EASI lack any shred of support for its position that Defendants authored the titles, EASI had proof that Defendants did not author the titles readily available to it on Rip-off Report's website. Anyone, including EASI or its attorneys can obtain a user name and password on Rip-off Report, without any charge, and test the process for filing a report or rebuttal. In doing so, they will confirm that the third step in the filing process is to create the report title. Following is a screen shot from that step of the process (next page):


Step 2: Title Your Rip-off Report
The title of your report is divided into four boxes below but will appear as one line after your report is submitted
The four boxes are:
(a) The name of the Company or Individual you are reporting
(b) Descriptive words explaining what they did to you.
(c) The city the Company or Individual is located in.
(d) The state the Company or Individual is located in.
xample Title Only. Fill out boxes A, B, C, and D for your title below.
ICI Worldcom Wireless
ripoff dishonest fraudulent billing
Garden City
New York
Company Name
Descriptive Words
City
State
= Required Entries
A. Enter all the names of the Company or Individual you are reporting
Be sure to include AKAs
Rip-off Report
(a)
If the company name does not appear, please enter
B. Enter Descriptive words to your title... to describe what the Company or Individual did to you
Be creative when using the example words, it will make your report more interesting.
This will also ensure your report gets found on the Internet Search Engines
Enter descriptive words, describe what the Company or Individual did to you.
(b)
Please limit to 20 words, you can add several phases and edit them too
C. Enter the City where the Company or Individual is located
If the Company or Individual is on the Internet and only on-line based, the city may be left blank
phoenix
(c)
If the city name does not appear, please enter
D. Enter the State where the Company or Individual is located

As reflected above, when an author drafts a report to post on Rip-Off Report, the author is asked to create a "title" for his submission. The wording of the title is solely the creation of the report's author, not Xcentric. This is also true as to the selection of the categories (such as "con artist") where the report is posted:


Rip-off Report.com - badbusinessbureau.com - Microsoft Internet Explorer
File Edit View Favorites Tools Help
Back
Address http://www.ripoffreport.com/Write.asp?
Links SnagIt
Step 4: Categorize Your Rip-off Report
** = Required Entries
First choose a topic, and then locate the best category that suits your report.
First
**choose a Topic:
Second
**choose a Category:
Look...
Check these out
for future reference!
->Outrageous & Popular Rip-Off
->Unusual Rip-Off
->Automotive
->Community
->Computers & Internet
->Dining
->Education & Instruction
->Electronics
->Entertainment
->Finance
Adult Web Sites
Adultery
Animal Abusers
Animal Shelters
Bad Check Writers
Bigamist
Bigots
Blabber Mouth
Civil Rights Violators
Con Artists
Correctional Facilities
Done
Internet

Any person who suspects that they have been the victim of defamation on Rip-Off Report is free to take a few moments to review the website's submission procedures to determine what information is created by the author. Any person conducting that investigation would learn that each and every part of the unique content in each report (such as the report text, the title, and the category in which it is placed) is all controlled solely by the author of the report, not by Xcentric.

Here, it cannot be disputed that Plaintiff knew prior to filing this action that no defamatory statements were created by Xcentric, and Plaintiff knew there was never any basis to allege that Xcentric was involved in the creation of "titles" or other indexing. These allegations were false and presented solely for the purpose of creating a viable claim where none existed. Because Plaintiff and Plaintiff's counsel have knowingly and repeatedly violated Fed. R. Civ. P. 11(b)(3), this Court should sanction them in the amount of all of Defendants' reasonable attorney's fees incurred in defending this frivolous action and any other sanctions which may be warranted in light of the seriousness of this conduct.

IV. SANCTIONS ARE WARRANTED UNDER RULE 11(c)

Under Rule 11, the district court may impose sanctions if a lawsuit is "not well grounded in fact and is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *National Wrecking Co. v. Int'l Brotherhood of Teamsters, Local 731*, 990 F.2d 957, 963 (7th Cir.1993); *see also Tropf v. Fidelity National Title Insurance Co.*, 289 F.3d 929 (6th Cir. 2002) (same rule). The court must "undertake an objective inquiry into whether the party or his counsel should have known that his position is groundless." *Id.* (quoting *CNPA v. Chicago Web Printing Pressmen's Union No. 7*, 821 F.2d 390, 397 (7th Cir. 1987) (citations omitted). Sanctions are appropriate where the claim is based on "allegations and other factual contentions lacking evidentiary support or unlikely to prove well-grounded after reasonable investigation." *Clinton v. Jones,* 520 U.S. 681, *709, 117 S.Ct. 1636, **1652 (1997).

Rule 11(c) of the Federal Rules of Civil Procedure allows courts to impose sanctions on a party if the requirements of Rule 11(b) are not met. *Id.* Rule 11(b)(2) requires that "the claims, defenses, and other legal contentions [of filings] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." While sanctions are not mandatory, sanctions should be imposed when an attorney or a party blatantly presents baseless pleadings. *See Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994). The amount of sanctions should be sufficient to deter future violations. Fed. R. Civ. P. 11(c)(2). *See also Cone Corporation v. Hillsborough County*, 157 F.R.D. 533, (M.D.FL 1994).

Here, Rule 11 sanctions are warranted because this action is entirely baseless. Plaintiff's counsel commenced this action and has refused to dismiss it despite the fact that the case has no valid legal or factual basis whatsoever. If counsel had conducted even a cursory factual investigation or review of the legal issues involved, this action would never have been filed. In addition, each of these issues were fully explained when this motion was provided to Plaintiff's counsel along with a request to dismiss this action voluntarily. The refusal to do so has necessitated this motion and supplies further support for the conclusion that sanctions are warranted here.

If Plaintiff is permitted to avoid liability for the damages and attorneys fees that have been incurred by Defendants herein, then a message will be sent to potential litigants that there is little risk in abusing the justice system for the sole purpose of financially devastating another company for the Plaintiff's own commercial gain.

V. CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court issue an order pursuant to Fed. R. Civ. P. 11 granting sanctions, against Plaintiff ENERGY AUTOMATION SYSTEMS, INC. ("EASI") and Plaintiff's attorneys JOHN R. JACOBSON, WILLIAM L. CAMPBELL, JR., W. RUSSELL TABER and BOWEN

RILEY WARNOCK & JACOBSON, PLC jointly and severally, in an amount equal to the reasonable costs and attorneys' fees incurred in defending the baseless claims improperly interposed by Plaintiffs in this matter.

Dated:______________________________ By:___________________________________

Maria Crimi Speth, Esq.
JABURG & WILK PC
3200 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000